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No.

In the Supreme Court of the United States

PETER PALIVOS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

ALLAN A. ACKERMAN
Counsel of Record
2000 North Clifton Avenue
Chicago, IL 60614
(312) 332-2891

Attorney for Petitioner
Peter Palivos

Midwest Law Printing Company/Photex — Chicago — (312) 431-0185

QUESTION PRESENTED

Petitioner contends that his 18 U.S.C. § 1503 conspiracy conviction was fundamentally flawed because the trial court omitted the essential "nexus" element in its jury charge (he was acquitted of the same charged conduct in the companion § 1503 substantive count). In *Aguilar v. United States,* 515 U.S. 593 (1995) and *Arthur Andersen LLC v. United States,* 544 U.S. 696 (2005), the Court held that "nexus" between defendant's acts or statements and ensuing conduct required [a] "nexus" in order to satisfy the § 1503 statutory mandates. *Aguilar,* 515 U.S. at 599-601, *Anderson,* 544 U.S. at 708.

Petitioner's trial counsel failed to voice an objection to the § 1503 jury charge. Thus, review should be consistent with *United States v. Olano,* 507 U.S. 725, 113 S.Ct. 1770 (1993). However, Justice O'Connor's opinion for the *Olano* majority pretermitted deciding whether plain-error(s) "should be presumed prejudicial if the defendant cannot make a specific showing of prejudice." *Id.* at 735 (quotation marks added). Petitioner maintains that the absence of "nexus" must be presumed prejudicial under the facts of his case.

1. Whether, on plain-error review, the complete absence of any "nexus" requirement in the district court's § 1503 jury charge merits review and reversal because of a prejudice presumption–[even] absent a specific showing of prejudice?

2. Whether this petition should be granted because the Seventh Circuit's "nexus" position conflicts with the § 1503 decisions from the Second and Third Circuits?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Peter Palivos (hereafter petitioner), respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was filed on April 10, 2007. App. 1-16. No petition for rehearing was filed. The opinion below is cited at 486 F.3d 250 (7th Cir. 2007).

JURISDICTION

The published opinion of the United States Court of Appeals for the Seventh Circuit was entered on April 10, 2007. App. 1-16. No petition for rehearing was requested, and on June 15, 2007, Justice Stevens granted petitioner's request for an extension of time to file this petition for a writ of certiorari to and including August 16, 2007 (Application No. 06A1181). The United States District Court had jurisdiction pursuant to 18 U.S.C. § 3231; the Court of Appeals for the Seventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

This Court's jurisdiction is pursuant to 28 U.S.C. § 1254(1).

CONSTITUTION, STATUTES AND RULES

U.S. Constitution, Fifth Amendment states (in pertinent part):

> No person shall be . . . [nor] be deprived of life, liberty or property, without due process of law . . .

U.S. Constitution, Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .

18 U.S.C. § 1503

§ 1503. Influencing or injuring officer or juror generally

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other commit-

ting magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

28 U.S.C. § 2111 states:

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties

Fed.R.Crim.P. Rule 52(b), states:

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT

1. **Introduction.** Before and during 1996, the Waterfalls restaurant (Waterfalls) in Antioch, Illinois, was owned/operated by an Illinois corporation (JACPG, Inc.). One of its shareholders was George Palivos (G. Palivos), a Chicago attorney (petitioner's brother).

During the spring of 1996, G. Palivos and his corporate partners agreed to sell Waterfalls for approximately $1,250,000.00. The prospective buyer, Peter Bouzanis (hereafter "buyer"), was not a U.S. citizen, had a felony conviction and was less-than-credit worthy. No matter. G. Palivos and others, including Nicholas Black, a Chicago attorney (attorney Black or Black), and Louis Marin (Marin), a self-styled financial maven, schemed to make it appear that the buyer had the wherewithal to purchase Waterfalls. Marin generated false financial data and tax returns, while G. Palivos made sure that the buyer was provided with various short-term loans in order to satisfy down payment and operating capital requirements for a Small Business Administration (SBA) loan. The loan closed during late April 1996, culminating with monies being distributed to the corporate shareholders (relevant details *infra*). Within a few months, the buyer defaulted on the SBA loan; default proceedings and a federal criminal investigation ensued.

Fast-forwarding to October 2000, attorney Black was served with a federal grand jury subpoena directing production of his records in connection with the 1996 Waterfalls transaction. In advance of production, Black maintained that he spoke with G. Palivos, and petitioner (also a Chicago attorney) regarding the creation of back-dated file notes. The records produced by Black included, *inter alia*, two-handwritten file notes, ostensibly relating to financial disputes between the Waterfalls buyer/sellers (thus supporting post-closing monies from the buyer to the sellers as repayment for short-term loans which enabled the 1996 deal to be consummated).

2. **Indictments.** During April 2001, the Waterfalls buyer and attorney Black were charged with multiple counts of mail and wire fraud in connection with the fraudulent 1996 SBA loan. The second superseding

indictment added G. Palivos; the third superseding indictment added petitioner and JACPG, Inc. The fourth superseding indictment, returned on April 30, 2002, included Marin, the financial maven assisting the buyer in the creation of false loan documents. R. 62. The fifth superseding indictment eliminated attorney Black (cooperating with the the government since 2001), but otherwise reproduced the fraud/obstruction offenses charged in the fourth superseding indictment. R. 62, 106.

Relevant to this petition, the fifth superseding indictment charged petitioner with obstructing and conspiring to obstruct justice in violation of 18 U.S.C. § 1503 (separate counts–reproduced at App. 17-22). R. 106. In substance, the obstruction charges related to fleeting conversations that attorney Black testified took place involving petitioner regarding backdating of handwritten file notes which Black produced pursuant to the 2000 federal grand jury subpoena.

From the date of petitioner's indictment (1/15/02) to and including the culmination of his direct appeal, petitioner was enlarged on bond and represented by counsel.

3. **Trial and post-trial proceedings.** Petitioner, Marin and JACPG, Inc., were tried in the United States District Court, in Chicago, commencing September 16, 2003. R. 133.[1]

Attorney Black was the sole government witness regarding petitioner's putative complicity regarding Waterfalls. He testified that while representing the Waterfalls sellers during 1996, he learned about a fabricated purchase price dispute shortly before the closing, but remained tacit regarding the purported fraud scheme. Tr. 1709.[2] The concocted "dispute" apparently originated with G. Palivos as a method of having the sellers return monies to the buyer–who then used those funds to repay short-term loans which the buyer needed to close the Waterfalls deal.

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[1] Messrs. Bouzanis (Waterfalls buyer) and G. Palivos (petitioner's brother) avoided trial by absconding to Greece. R. 109-10, 363-64.

[2] Black later testified that petitioner had no involvement whatsoever in the 1996 Waterfalls transaction. Tr. 1877.

Tr. 1705-10. To explain: the charged SBA frauds were predicated on documents supporting a 1996 feigned purchase price dispute, whereby the sellers remitted $392,000 to the buyer. In turn, the buyer repaid the "down payment and operating capital" loans which were not disclosed to SBA but needed for final SBA [loan-guarantee] approval.

Black testified that after being served with a federal grand jury subpoena during October 2000, he spoke with G. Palivos–who reminded him of the 1996 "purchase price dispute." Tr. 1793, 1797. Black told G. Palivos that if the notes were not in his file "they would be," meaning that Black would create the notes. Tr. 1798-99. A couple of days later Black met with G. Palivos at the Chicago law offices he shared with petitioner. G. Palivos showed Black some of the letters that had been created in advance of the 1996 closing to document the "purchase price dispute." Tr. 1799; 1811-15. Petitioner walked by while Black and G. Palivos were chatting; Black testified that petitioner simply told Black it would be "nice" if Black found the [price dispute] notes in his file. Tr. 1817. After Black located his 1996 Waterfalls file he again met with G. Palivos. The file failed to include the "dispute" letters or notes. Tr. 1818-19. While Black related the absence of the letters/notes to G. Palivos, petitioner stopped by and (per Black) petitioner again said it would be "nice" if Black found the notes. Black related that the notes "would be in the file." Tr. 1819-20. According to Black, this tete-a-tete included petitioner suggesting that Black locate old paper and an old pen to cobble the backdated notes. Tr. 1821-25. Black testified that he created dual notes and on November 15, 2000 he delivered his file (with the notes) in response to the federal grand jury subpoena. Tr. 1833. Neither the grand nor trial jury received any of Black's corroborative physical evidence (*e.g.*, old pens, pads of paper or the like).

The trial record disclosed the content of the dual notes: (1) The "dispute note" dated 3/22/96 which referred to the buyer's attorney threatening to file a lawsuit because of problems with the restaurant's building, roof and kitchen; the buyer wanted purchase price credit to settle these disputes and [Black] told G. Palivos not to give any credit or purchase price reduction unless necessary. Tr. 1827-29; (2) the "inventory note" dated 4/26 recited that attorney

Black spoke with the buyer's attorney–buyer was to provide a check for $25,000 to pay off inventory [note]–George [Palivos] wanted a blank check so he could put petitioner's name on it–because he owed petitioner money. Tr. 1831 (summarizing both notes).

Mary Fitzgerald, the government's handwriting/ink impression expert, testified that the two notes identified by Black involved three different inks, two being commercially available in 1996; the third may have been commercially available in 1996, but she was unable to locate an ink-match. Tr. 1612-15. The third ink was used on the 3/22/96 "dispute" note, but there was no scientific determination regarding when that note was created. Tr. 1631. The second note (4/26/96 "inventory" note) was prepared with two different ink pens. Tr. 1633-34. Regarding the paper used, she was unable to "date" the paper, but there were indentations on the two pieces of paper used to create the note–from two different pads. In the end, the government expert was unable to determine when the 4/26/96 "inventory note" was written, and she was unable to arrive at a scientific conclusion regarding when either note was created; and there was nothing, based on forensic testing, connecting the two notes to the year 2000 (Tr. 1616, 1622-23, 1625, 1636-37).[3]

At the close of the government's case, petitioner's Rule 29 motion was rejected and he refrained from presenting evidence. R. 157. Following the arguments of counsel and jury instructions, petitioner was convicted on count six (§ 1503 conspiracy) and acquitted on count seven (substantive § 1503 charge). R. 161, 163. Timely post-trial motions

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[3] While not germane to the Questions Presented, the Court may consider that the post-trial record reveals that on June 21, 2005, during a hearing before the Illinois Disciplinary Commission involving Black's law license, he conceded that he would not have pled guilty and cooperated with the government had he known that its forensic analysis of the handwritten notes failed to establish when the notes were written. R. 262 at Exh. A, Tr. 73-74, 80, 86. During the same proceeding Black maintained that the government had represented that its "ink" analysis "would definitely prove" that the notes were prepared shortly before 2000 (as opposed to 1996 or 1997–as Black had related to the government during early 2001 interviews). *Ibid.*

were rejected. R. 187, 213, 281.[4] On October 20, 2005 petitioner was sentenced to twelve months and one day in custody. R. 297. On May 26, 2006 attorney Black was sentenced to three years probation. R. 359.

On direct appeal, petitioner contended entitlement to appellate relief predicated on the government's failure to disclose impeaching information relating to attorney Black pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, and the flawed § 1503 conspiracy instruction. Pertinent to this petition, the § 1503 conspiracy-obstruction jury charge read:

> A conspiracy is an agreement between two or more persons to accomplish an unlawful purpose. Peter Palivos is charged with conspiracy in Count 6.
>
> To sustain the charge of conspiracy, the government must prove the following: First, that the conspiracy as charged existed and, second, that each defendant knowingly became a member of the charged conspiracy with an intention to further the conspiracy. And, third, that an overt act was committed by at least one conspirator in furtherance of the charged conspiracy.
>
> If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty of the charged conspiracy. If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reason-

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[4] The thrust of petitioner's actually innocent post-trial filings related to the lack of *Brady* disclosures regarding the interaction between the government and attorney Black. R. 187, 213 and 281. This petition does not involve the rejection of the *Brady*-related post-trial and appellate arguments.

able doubt, then you should find the defendant not guilty of the charge of conspiracy.

A conspiracy may be established even if its purpose was not accomplished. It is not necessary that all the overt acts charged in the indictment be proved and the overt act proved may itself be a lawful act. To be a member of the conspiracy, the defendant need not join at the beginning or know all the other members or the means by which its purpose was to be accomplished. The government must prove beyond a reasonable doubt that the defendant was aware of the common purpose and was a willing participant.

To sustain the charge of obstruction of justice the government must prove the following propositions: First, that defendant Peter Palivos influenced, obstructed, impeded or endeavored to influence, obstruct or impede the due administration of justice. Second, that defendant Peter Palivos acted knowingly. And, third, that defendant Peter Palivos' acts were done corruptly; that is, by producing and causing the production of materially false and misleading documents in response to the grand jury subpoena served upon Nicholas Black with the purpose of wrongfully impeding the due administration of justice.

486 F.3d at 257-58. App. 12-13.

While affirming, the appellate panel explained:

> While the relationship between the conspiracy and the obstruction of justice could have been stated a bit more clearly, we find that, viewed as a whole, the instructions fairly and accurately informed the jury of the elements of the crime.

486 F.3d at 258. App. 13.

REASONS FOR GRANTING THE WRIT

This Court's precedents support the granting of review and relief. Consistent with the Fifth and Sixth Amendments, the government must prove each element of the charged criminal offense beyond a reasonable doubt, and the jury must be so instructed. Moreover, the case below conflicts with § 1503 decisions from the Second and Third Circuits.

1. The Court's recent holdings require a "nexus" [essential] element to sustain conviction pursuant to 18 U.S.C. § 1503.

In *United States v. Aguilar*, 515 U.S. 593, 115 S.Ct. 2357 (1995), the Court examined, in part, § 1503's omnibus clause. The Court explained that the government had to prove a "nexus" between the defendant's intentional act and the likelihood of potentially affecting the administration of justice. 515 U.S. at 599. The Court reversed the § 1503 conviction because the government failed to prove, beyond a reasonable doubt, that the false statements cannot be said to have the natural and probable effect of interfering with the due administration of justice. 515 U.S. at 601 (quotation marks omitted). The obstruction conviction was reversed even though the "lied-to" agent had represented to Judge Aguilar that the grand jury might hear evidence related to his attempt to thwart its investigation. 515 U.S. at 595-97. Chief Justice Rehnquist, writing for the majority, discussing § 1503 observed:

> We do not believe that uttering false statements to an investigating agent–and that seems to be all that was proved here–who might or might not testify before a grand jury is sufficient to make out a violation of the catchall provision of § 1503.

515 U.S. at 600.

The Court's recent opinion in *Arthur Andersen LLP v. United States*, 544 U.S. 696, 125 S.Ct. 2129 (2005) supports the granting of review and conviction vacation. In *Andersen*, the Court considered jury instructions in connection with 18 U.S.C. § 1512(b) where *Andersen* was charged in a single count indictment with causing the destruction or withholding of documents in connection with

regulatory and criminal proceedings and investigations. 544 U.S. at 702. Petitioner was convicted and the principal issue on appeal related to § 1512 jury instructions. After parsing "corruptly persuading" and "knowingly," the Court explained that § 1512 must be interpreted as written. *Id.* at 705. And citing, *inter alia, United States v. Aguilar*, *ante*, the Court explained:

> The outer limits of this element [corruptly persuades] need not be explored here because the jury instructions at issue simply failed to convey the requisite consciousness of wrongdoing. Indeed, it is striking how little culpability the instructions required.

544 U.S. at 706. The *Andersen* jury was instructed that "corruptly" meant [that] to convict, it need only find that *Andersen* intended to "subvert, undermine, or impede" government factfinding by suggesting to its employees that they enforce the document retention policy. *Id.* at 706. While reversing *Andersen's* conviction the Court noted that "impede" has broader connotations than "subvert" or "undermine." And, therefore, innocent conduct was necessarily included because "corruptly" instructions had virtually no limitations. *Id.* at 707.[5] Further, the challenged instructions failed to alert the jury that there was a necessary "nexus" between the "persuasion to destroy documents and any particular proceedings."

Chief Justice Rehnquist's opinion for the full Court explained that it considered a similar situation in *Aguilar*, where § 1503 was charged and the conviction related to "corruptly endeavoring to influence, obstruct, and impede [a] . . . grand jury investigation." The Chief Justice explained:

> All the Government had shown was that Aguilar had uttered false statements to an investigating agent "who might or might not testify before a grand jury." *Id.*, at 600, 115 S.Ct. 2357. We held that § 1503 required something more-specifically,

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[5] Notwithstanding *Arthur Andersen*, the single § 1503 instruction in petitioner's case failed to define any of the impacting terms (*i.e.*, impeded, endeavored or corruptly). App. 12-13.

> a "nexus" between the obstructive act and the proceeding. *Id.*, at 599-600, 115 S.Ct. 2357. "[I]f the defendant lacks knowledge that his actions are likely to affect the judicial proceeding," we explained, "he lacks the requisite intent to obstruct." *Id.*, at 599, 115 S.Ct. 2357.

544 U.S. at 708 (quotation marks in original).

Blending *Aguilar* and *Arthur Andersen*, this Court clearly concluded that, at least for § 1503, the "nexus" requirement was an [§ 1503] essential element. *Arthur Andersen*, 544 U.S. at 708.

The government's evidence regarding petitioner disclosed that he had two fleeting discussions with attorney Black who was scheduled to provide his 1996 Waterfalls file to a federal investigator pursuant to a federal grand jury subpoena. Yet, the trial record fails to reveal whether that file was actually considered by the special grand jury returning the superseding indictments charging petitioner with obstruction pursuant to § 1503 (App. 17-22, *infra*). Moreover, the single obstruction/conspiracy to obstruct jury instruction all but eliminated the "nexus" element as mandated in *Aguilar* and *Andersen* (challenged instruction reproduced at pp. 8-9, *ante* and App. 12-13, *infra*). In the wake of *Aguilar* and *Arthur Andersen*, it is clear that the singular jury instruction in petitioner's case omitted the essential "nexus" § 1503 element.

2. The case below conflicts with current decisions from the Second and Third Circuits.

In *United States v. Quattrone*, 441 F.3d 153, 171-74 (2nd Cir. 2006), the court assayed the § 1503 nexus requirements while reversing convictions in a case involving the destruction and hiding of records relating to stock trading during concurring SEC and federal grand jury investigations. *Id.* at 172-73. While reversing, the Second Circuit explained that while the evidence was sufficient to establish the § 1503 nexus "elements," nonetheless reversal was required because jury instructions failed to include the "nexus" [essential] element. *Id.* at 177-80 and nn. 24-26. The appellate panel also explained that for § 1503 convic-

tion affirmation: "more is required; a defendant must know that his corrupt actions are likely to affect the . . . proceedings." 441 F.3d at 178-79 (citing *Aguilar;* quotation marks and ellipsis in original). Finally, citing *Neder v. United States*, 527 U.S. 1, 18, 119 S.Ct. 1827 (1999), the reversing panel explained:

> In order to uphold a conviction premised upon erroneous instructions, we must find it "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." * * * *Neder* instructs that reviewing courts will often [have to] . . . conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error–for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding–it should not find the error harmless.

441 F.3d at 179.

In *United States v. Vampire Nation*, 451 F.3d 189 (3rd Cir. 2006), the court rejected defendant Banks' challenge to his conviction for witness tampering under 18 U.S.C. § 1512(b)(2)(A). 451 F.3d at 188. While affirming the § 1512(b) conviction, the court agreed that *Arthur Andersen* clarified that a conviction under § 1512 cannot succeed if the government fails to show a "nexus between the persuasion to [impede] and any particular proceeding" (citing *Andersen*, 125 S.Ct. at 2136). While affirming (plain-error review) the Third Circuit specifically noted that the "nexus" element was satisfied by virtue of jury instructions embracing "the specific intent" to induce another to withhold evidence from an official proceeding; in other words the instruction required the jury to find some connection–*i.e.*, a nexus–between *Banks*' actions and an official proceeding "in that *Banks* could not be convicted unless the jury found he intended to persuade Do [the witness] to impede an official proceeding, which official proceeding–given Do's email regarding his subpoena *Banks*

was well aware of." 451 F.3d at 205.[6]

A fair reading of *Vampire Nation* suggests that because the jury was clearly instructed regarding the defendant's "specific intent," there was no (plain) reversible error. In stark contrast to *Vampire Nation*, petitioner's singular substantive and conspiracy obstruction instruction failed to incorporate either "specific intent" or nexus (pp. 8-9 and App. 12-13).

In *United States v. LeMoure*, 474 F.3d 37 (1st Cir. 2007) the court affirmed, *inter alia*, obstruction and witness tampering convictions pursuant to 18 U.S.C. §§ 1503 and 1512(b). The defendants challenged the § 1503 convictions based on the proposition that § 1503, as amended in 1982, failed to embrace witness tampering because the amendment to § 1503 eliminated explicit reference to "witnesses." The defendant posited that § 1512 (enacted in 1982) became the witness tampering statute. 474 F.3d at 40. The *LeMoure* court agreed that "witness" was deleted from the first clause of § 1503 in 1982, but because the "omnibus" clause which forbid efforts to obstruct the due administration of justice remained, § 1503 did not mandate that witness tampering convictions could not be sustained under § 1503. *Id.* at 41. The court rejected the holding of the Second Circuit in *United States v. Masterpol*, 940 F.2d 760, 762-63 (2nd Cir. 1991) which held that § 1512(b) superseded § 1503.[7]

Clearly the Second and Third Circuits require the "nexus" element to be an integral component of § 1503 jury

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[6] The *Vampire Nation* court distinguished *Arthur Andersen* and *United States v. Quattrone* explaining that in *Arthur Andersen* there was no nexus instruction "between the persuasion and any particular proceeding was necessary to convict," and *Quattrone* based on the lack of jury instructions encompassing the "nexus requirement." 451 F.3d at 206 n. 16.

[7] The First Circuit decision in *LeMoure* notes that the Second Circuit's position regarding the dichotomy between 18 U.S.C. §§ 1503 and 1512(b) as reflected in *United States v. Masterpol*, 940 F.2d 760, 762-63 (1991) conflicts with decisions from the Fourth, Fifth, Sixth, Seventh, Ninth and Eleventh Circuits. 474 F.3d at 41 n. 2 (collecting cases).

instructions (in *Vampire Nation* the Third Circuit opined that "specific intent" may, *arguendo*, serve as the functional equivalent of "nexus"). However, as the case below reveals, the Seventh Circuit has eliminated, contrary to *Aguilar* and *Arthur Andersen*, the "nexus" [essential] element. Moreover, given the circuit discord regarding "nexus," this petition provides an opportunity for the Court to resolve the post-*Aguilar*/*Arthur Andersen* circuit discord.

3. The Court's precedents equates the absence of an essential element from the jury charge to the functional equivalent of directing a verdict for the government.

Petitioner is cognizant that this Court considers the "overall jury charge," *Middletown v. McNeil*, 541 U.S. 433, 437, 124 S.Ct. 1830 (2004) ("a single instruction to the jury may not be judged in artificial isolation but must be viewed in the context of the overall charge.") (quoting *Boyde v. California*, 494 U.S. 370, 378, 110 S.Ct. 1196 (1990)). In the case at hand, petitioner's jury failed to receive any § 1503 instruction save for that which appears at pp. 8-9, *supra*, App. 12-13.[8]

In *Carella v. California*, 491 U.S. 263, 109 S.Ct. 2419 (1989), the Court considered whether certain jury instructions were violative of due process. While finding that the presumption instructions merited conviction vacation, the Court observed:

> The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the

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[8] The trial court's complete jury charge appears in the trial record at Tr. 2344-63. JACPG, the corporate entity on trial was charged with mail, wire and bankruptcy fraud (jury charge at Tr. 2352-56). Petitioner was charged only with conspiracy to obstruct and obstruction [§ 1503] and no other offense. The singular blended conspiracy/substantive obstruction jury charge appears at Tr. 2357-58. App. 12-13. Petitioner was acquitted of the substantive obstruction (count seven), Tr. 2379.

> charged offense. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970). Jury instructions relieving States of this burden violate a defendant's due process rights. See *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); * * * .

491 U.S. at 265, 109 S.Ct. at 2420. Justice Scalia's concurring opinion, in part, explained that the absence of essential elements in the trial court's jury charge can rise to the level of a directed verdict for the prosecution which, of course, is constitutionally impermissible, citing *United States v. Martin Linen Supply, Co.*, 430 U.S. 564, 572-73, 97 S.Ct. 1349 (1977). Citing *Carpenters vs. United States*, 330 U.S. 395, 408-09 (1947), Justice Scalia explained:

> "No matter how strong the evidence may be of an association's or organization's participation through its agents in the conspiracy, *there must be a charge to the jury setting out correctly the limited liability under* [the Norris-LaGuardia Act, 47 Stat. 70,] *of such association or organization for acts of its agents. For a judge may not direct a verdict of guilty no matter how conclusive the evidence. There is no way of knowing here whether the jury's verdict was based on facts within the condemned instructions . . . or on actual authorization or ratification of such acts. . .." Id.*, at 408-409, 67 S.Ct., at 782 (footnotes omitted).

491 U.S. at 268-69 (ital. emph. added; brackets in original). Thus, the absence of essential elements, limiting criminal liability from the jury charge (as in *Carpenters*) may be tantamount to directing a verdict for the prosecution. *Ibid.*

In *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827 (1999), Chief Justice Rehnquist's opinion for the Court held that "materiality of falsehoods" are offense elements in prosecutions involving, *inter alia*, mail, wire, bank and tax fraud(s). However, *Neder's* jury was not instructed that materiality was an offense element for mail and tax frauds. 527 U.S. at 6. The *Neder* majority affirmed the lower court's holding that the failure to instruct on "materiality" was not structural [error] but, rather, subject to harmless-error evaluation. Moreover, since the defendant

conceded "materiality" during trial, conviction affirmation ensued because the error was harmless. 527 U.S. at 17-18.

Justice Scalia (joined by Justices Souter and Ginsburg) dissented, in part, urging conviction vacation because . . . to deprive "a criminal defendant of the right to have the jury determine his guilt of the crime charged–which necessarily means his commission of *every element* of the crime charged–can never be harmless." 527 U.S. at 30 (ital. in original). Justice Scalia likened a jury charge omitting essential elements to directing a verdict of guilty, something which the Court has never sanctioned. *Id.* at 33 (citations omitted). Furthermore, the dissent questioned why structural error did not ensue where an element of the offense was removed from jury consideration. *Id.* at 33-38. Thereafter, citing *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078 (1993), Justice Scalia observed:

> The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict *actually rendered* in *this* trial was surely unattributable to the error.

527 U.S. at 38 (ital. emph. in original).[9]

Thus far the Court has eschewed embracing Justice Scalia's constitutionally-rooted *Neder* dissent. This petition provides a suitable vehicle for the Court, in the wake of *Aguilar/Arthur Andersen*, to revisit questions revolving around whether the omission of an essential element in the jury charge rises to the level of structural/harmful error.[10] Clearly, post-*Aguilar/Arthur Anderson* it is pristine that "nexus" is an essential § 1503 element. And, while petitioner's case involves plain-error, nonetheless the complete

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[9] In *Neder*, Justice Stevens concurred, criticizing the majority's harmless-error analysis. 527 U.S. at 26-27 (intimating that segments of Justice Scalia's passionate dissent may, *arguendo*, be correct–albeit somewhat "misdirected."). *Id.* at 28.

[10] In *Washington v. Recuenco*, __ U.S. __, 126 S.Ct. 2546, 2551-53 and nn. 3-4 (2006) the Court, per Justice Thomas, considered *Neder* while rejecting respondent's claims that the State court had impermissibly enhanced his sentence contrary to *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004).

absence of "nexus" must be deemed plain-error because petitioner was acquitted of the same putative misconduct in the companion § 1503 substantive count. App. 1. Relatedly, this Court, and the lower courts have consistently held that conspiracy criminal intent is lacking without [the] criminal intent essential for the substantive offense, *Ingram v. United States*, 360 U.S. 672, 678, 79 S.Ct. 1314 (1959) ("Conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense."); *United States v. Frankhauser*, 80 F.3d 641, 653 (1st Cir. 1996) (the government must prove that the defendant had an intent to agree and an intent to effectuate the commission of the substantive offense) (parallel citation omitted); *United States v. Dazey*, 403 F.3d 1147, 1159 (10th Cir. 2005) (. . . a conspiracy conviction requires at least the degree of criminal intent necessary for the substantive offense itself); *United States v. Searan*, 259 F.3d 434, 441 (6th Cir. 2001) (same citing Learned Hands' classic "traffic light" analogy in *United States v. Crimmins*, 123 F.2d 271, 273 (2nd Cir. 1941)).

Petitioner maintains that this petition should be granted and his conviction reversed because Justice Scalia's constitutionally-rooted approach regarding the omission of an essential element of the jury charge is profoundly correct. Moreover, given petitioner's § 1503 substantive count-acquittal, if *Ingram* and its progeny remain viable, then petitioner's § 1503 conspiracy conviction should be reversed.

4. Petitioner has satisfied *Olano's* plain-error standards.

In *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770 (1993), Justice O'Connor, writing for the majority, held that the presence in the jury room of two alternate jurors, neither of whom apparently participated in deliberations, failed to rise to the level of plain-error pursuant to Fed.R.Crim.P. 52(b). The *Olano* Court examined the contours of Rule 52(b) and articulated its components: (1) the proceedings below involved error, (2) the error is plain, and (3) the error affected the substantial rights of the aggrieved party. Where the defendant demonstrates (1)-(3),

he/she must also demonstrate that the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." 507 U.S. at 733-36. Where the defendant demonstrates each *Olano* component, the reviewing court then has discretion to correct the [plain] error.[11] However, *Olano* explained that "although perhaps not in every case, the defendant must make a specific showing of prejudice to satisfy the "affecting substantial rights" prong of Rule 52(b), observing: "we have never held that a Rule 52(b) remedy is *only* warranted in cases of actual innocence." *Id.* at 735-36 (quotation marks and italics in original). But while rejecting plain-error relief, the Court observed: "We need not decide whether the phrase affecting substantial rights is always synonymous with prejudice." 507 U.S. at 735 (original quotation marks omitted).

Recently, in *United States v. Dominguez-Benitez*, 542 U.S. 74, 81-82, 124 S.Ct. 2333 (2004) the Court explained petitioner's burden in establishing whether the district court error affected substantial rights (To affect "substantial rights," see 28 U.S.C. § 2111, an error must have "substantial and injurious effect or influence in determining the . . . verdict." *Kotteakos, supra,* at 776, 66 S.Ct. 1239. In cases where the burden of demonstrating prejudice (or materiality) is on the defendant seeking relief, we have invoked a standard with similarities to the *Kotteakos* formulation in requiring the showing of "a reasonable probability that, but for [the error claimed], the result of the proceeding would have been different.") (quotation marks in original, citations and n. 8 omitted) 542 U.S. at 81-82.

Petitioner maintains that the failure to provide any "nexus" jury instruction is/was: (1) error, (2) which is "plain," and (3) it affect[ed] his substantial right to have the jury charged on every essential statutory element of § 1503 in accordance with *Aguilar* and *Arthur Andersen.* Petitioner contends, under the facts of his case, that the

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[11] Within Charles Alan Wright et al., *Federal Practice & Procedure* § 856, at 490-514 (3d ed. 2004) Professor Wright examines the background of pre-and post-*Olano* decisions while reviewing the background of Fed.R.Crim.P. 52(b).

error seriously affect[ed] the fairness, integrity and/or public reputation of the trial proceedings. Moreover, his acquittal on the substantive obstruction count provides "a reasonable probability that, but for [the instructional error] the results of the proceeding would have been different," *Dominguez-Benitez, ante*, 542 U.S. at 81-82.

A recent example of plain-error based on instructional error is *United States v. Dobson*, 419 F.3d 231 (3rd Cir. 2005), where the court reversed mail fraud convictions under 18 U.S.C. § 1341 because the jury instructions failed to include "culpable participation" as a component of the mail fraud scheme. The *Dobson* court was confronted with deciding whether *Olano* plain-error standards mandated conviction vacation. 419 F.3d at 236. After parsing the evidence (sufficient to convict), and considering the overall jury charge the court reversed. Initially the court considered the *Olano's* standards finding that the erroneous jury charge was (1) error, (2) that the error was plain–meaning clear or obvious, and (3) that it affected *Dobson's* substantial right–meaning was there a "reasonable likelihood" that the omitted elements prejudiced her because the jury applied the challenged instruction in an impermissible manner. 419 F.3d at 240. After concluding that there was plain-error which impacted on *Dobson's* substantial rights, the court then had to decide whether the error seriously impacted the "fairness, integrity or public reputation of [the] judicial proceedings." *Id.* at 240-41 (citing *Olano*). While granting relief, the court, explained:

> Because a conviction based on an incomplete charge taints the reputation of the judicial proceedings, we will vacate *Dobson's* conviction and remand the matter for a new trial.

419 F.3d at 241. Another recent instructional plain-error reversal is *United States v. Alferahin*, 433 F.3d 1148 (9th Cir. 2006). In *Alferahin*, the court reversed a false U.S. citizenship-naturalization conviction charged pursuant to 18 U.S.C. § 1425(a). While the district court and parties were reviewing jury instructions, defense counsel objected to the district court's proposed jury instructions incorporating "materiality" as an essential § 1425(a) element. 433 F.3d at 1153. On direct appeal, the Ninth Circuit held that the omission of materiality from the jury charge was "contrary to law." 433 F.3d at 1153.

The reversing panel analyzed the instructional error in accordance with *United States v. Olano*. 433 F.3d at 1156-57. Within the fabric of its reversal, the Ninth Circuit citing *United States v. Gaudin*, 515 U.S. 506, 511, 115 S.Ct. 2310 (1995) and *Sullivan v. Louisiana*, 508 U.S. 275, 277-78, 113 S.Ct. 2078 (1993), explained that the criminal defendant has the right to demand that a jury find him guilty of all elements of the crime charged and the prosecution has the burden of proving each [charged] element beyond a reasonable doubt. The reversing panel also found support for plain-error reversal in *Carella v. California*, 491 U.S. 263, 265, 109 S.Ct. 2419 (1989) ("The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. Jury instructions relieving States of this burden violate a defendant's due process rights." (citing *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970))). The *Alferahin* court rejected the government's reliance on *Neder v. United States, ante,* finding that the cases cited by the government "relied on the existence of strong and convincing evidence that the missing element of the crime had been adequately proved by the prosecution." *Id.* at 1158 (citations and internal quotation marks omitted). At bar, petitioner suggests that the government's evidence in his case was neither "strong" nor convincing as evidenced by both his acquittal on the parallel substantive count and the fact that the only testimony linking him to obstruction *vel non* was provided by attorney Black who testified in exchange for dismissed charges and a sentence of probation.

Many published opinions regarding jury instructions and the omission of an offense element cite *Henderson v. Kibbe*, 431 U.S. 145, 97 S.Ct. 1730 (1977). In *Henderson*, the Court considered that which must be shown by the petitioner in order to prevail where an instruction-omission issue is presented on collateral review. Justice Stevens' opinion for the full Court reversed the Second Circuit which had granted habeas relief where the state trial judge failed to provide a "causation" instruction, although the trial facts squarely rejected the need for such an instruction (and the defense never requested a "causation" instruction). The *Henderson* facts disclosed that he had participated in an armed robbery of the victim and, after

robbing and stealing the victim's car, left him (drunk and almost naked) on a roadway in mid-winter. The victim was run over while attempting to flag-down a motorist and died as a result of those injuries. 431 U.S. at 147, 150 and nn. 1-2. Based on the totality of facts and the overall jury charge the Court held that the omitted instruction had no impact whatsoever on *Henderson's* conviction. Relevant to this petition, Justice Stevens explained:

> The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment *is even greater than the showing required to establish plain error on direct appeal.* The question in such a *collateral proceeding* is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process, not merely whether the instruction is undesirable, erroneous, or even universally condemned.

431 U.S. at 150 (ital. emph. added, n. 13 and citations omitted).

Petitioner posits that where the *Henderson* Court embraced the clear distinction between "plain-error on direct appeal" and "collateral proceedings," that necessarily meant (means) that on direct appeal from a federal criminal conviction the Court need not consider the familiar 28 U.S.C. § 2254 concepts relating to comity or finality. Rather, the Court may decide the case (and this petition) pursuant to 28 U.S.C. § 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Allan A. Ackerman
Counsel of Record

Attorney for Petitioner
Peter Palivos

2000 N. Clifton Avenue
Chicago, Illinois 60614
Telephone: (312) 332-2891
Facsimile: (773) 871-3304

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 05-4258 & 05-4329

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PETER PALIVOS and LOUIS MARIN,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 00 CR 1065—Joan Humphrey Lefkow, Judge.

ARGUED JANUARY 17, 2007—DECIDED APRIL 10, 2007

Before FLAUM, KANNE, and EVANS, Circuit Judges.

EVANS, Circuit Judge. Peter Palivos, an attorney, and Louis Marin, a loan broker, were indicted, along with a number of other defendants, for their involvement in a shady 1996 real estate deal. Both were convicted— Marin of assisting in the preparation and presentation of a false tax return and Palivos of conspiracy to obstruct justice—though he was acquitted of obstruction of justice. They appeal their convictions.

The deal involved a complex loan fraud scheme in which the seller of a problem-plagued restaurant, the Waterfalls, in Antioch, Illinois, secretly fronted money to the buyer to finance the sale. The seller, also a defendant in this case,

was JACPG, Inc., a private corporation with a small number of shareholders, including Palivos and his brother George Palivos,[1] also a defendant. The buyer was Peter Bouzanis,[2] who had no financial resources, only limited experience in the restaurant business, was a felon, and had a lackluster credit history. Other than that, he seemed perfect.

The mortgage to finance the purchase was obtained from The Money Store and was partially guaranteed by the United States Small Business Administration (SBA). The loan itself was for approximately $1.25 million. Because of misrepresentations made during the loan application process, The Money Store and the SBA were not aware that 100 percent of the funds for the closing came from the seller.

Making the deal go through required a bit of imagination. To qualify for the loan, Bouzanis presented false income tax returns to The Money Store. He also completed a document that allowed the lender to obtain his federal income tax forms. Because the 1994 tax return Bouzanis filed with the Internal Revenue Service showed an adjusted gross income of $8,005, hardly enough to convince any lender to give him a big loan, Marin instructed his accountant to prepare an amended income tax return for Bouzanis showing an income of $52,000.

Obviously, Bouzanis had no money for a down payment so, as we said, the sellers provided it. Bouzanis was required to come to the closing with over $350,000 for a down payment and evidence of $45,000 in working capital.

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[1] When we refer to "Palivos" we mean Peter. When necessary, we will use full names to distinguish between Peter and George.

[2] George Palivos and Bouzanis are fugitives believed to be living in Greece.

To come up with the money, Palivos's brother-in-law Dimitrios Bousis went to a bank where he was a long-time customer and pledged his own accounts to guarantee a $354,000, 5-day, interest-free bank loan to Bouzanis. The bank cut a cashier's check indicating that it represented the proceeds from a loan. Because the sellers knew the down payment could not be encumbered, they asked the bank to void that check and issue a replacement with no reference to a loan. Bousis and Palivos also helped Bouzanis convince the lender he had $45,000 in working capital. Palivos purchased a $45,000 cashier's check which Bousis deposited into his bank account. Bousis then wrote a $45,000 personal check to Bouzanis, who deposited it in an account that he had opened that same day for the new restaurant business.

To explain why so much money changed hands around the time of the closing, the parties fabricated a purchase price dispute and manufactured a paper trail. The paper trail consisted of bogus letters between the parties discussing the poor condition of the restaurant. The dispute was then "settled" by a payment after the closing of $392,500 to Bouzanis. Bouzanis then wrote a check to Palivos for $25,000 in "Partial Repayment of Loan," as stated on the check memo. The proceeds remaining from the sale were distributed to JACPG shareholders. Palivos received $75,000. That sum, along with the $25,000 from Bouzanis, amounted to a $100,000 gain for Palivos from the fraudulent transfer.

After Bouzanis purchased the restaurant he immediately defaulted on the loan. That, in turn, led to a criminal investigation by the SBA Office of Inspector General and the Federal Bureau of Investigation. The government served grand jury document subpoenas on the subjects of the investigation, including Nicholas Black, a real estate lawyer who represented JACPG. Black is central to Palivos's appeal.

After he was served with the subpoena in 2000, Black talked with George Palivos, who reminded Black of the so-called purchase price dispute. George Palivos asked Black if he had kept notes from the transaction. Black said that if notes were not in his file, "they would be."Black testified at trial that what he meant by that statement was that he would make up notes.

A few days later, George Palivos showed Black other letters that had been made up at the time of the sale to document the phony purchase price dispute. Peter Palivos joined the discussion and told Black that it would be "nice" if Black found similar notes in his file. After Black located his file from the closing, he met again with Peter and George Palivos. At that time, there were no notes in Black's file about the dispute or about the check from Bouzanis to Peter Palivos. Again Peter Palivos told Black that it would be "nice" and "helpful" if there were notes, which would appear as if they were written at the time of the "dispute" in 1996. Black said "they would be in the file." It was important that the notes be "found" in Black's file because he had prepared the paperwork for the deal.

Later, though, Black seemed to get cold feet and expressed concern about fabricating the notes. Saying that sometimes doctors involved in malpractice litigation manufactured notes, Peter Palivos told Black to find old paper and an old pen to write the notes and suggested that he rub the paper against something so no one could tell when the notes were written. Black did as was suggested and manufactured notes: one about the purchase price dispute and one about money Bouzanis refunded to Palivos after the closing. Black personally delivered the notes, as required by the subpoena, to a government agent. He also gave Palivos copies of the letters. Palivos thanked Black and said he appreciated what he had done.

But the government was not fooled by the notes. Almost immediately, agents went to Black's office to question him.

They also submitted the notes to the IRS Crime Laboratory for analysis. The results of a laboratory indentation analysis revealed what was written on the legal pad paper directly above the notes—that is, paper that presumably would have been used before the notes were created. The indentations showed a reference to July 1997, confirming the government's doubts about Black's statement that he wrote the notes in April 1996.

The government arranged a meeting with Black's attorney. In the meeting, the attorney was told that the government had forensic evidence showing that the notes were written long after the closing. Black was not present.

Soon after that meeting Black changed lawyers, and his new attorney informed the government that Black wanted to cooperate with the investigation. During several meetings with the government, Black explained what he knew about the fraud and the subsequent obstruction of justice. He also testified before the grand jury. Black was charged for his involvement with the loan fraud and the subsequent obstruction of justice. He ultimately pled guilty.

We turn our attention back to Palivos. In the district court Palivos filed at least six post-trial motions for relief from his conviction. All were denied. He now raises several, somewhat related, issues on appeal.

First, he contends that he was convicted based only on Black's testimony, which he claims was false and was given because Black was manipulated into framing him. We review the denial of his request for a new trial for an abuse of discretion, United States v. Van Eyl, 468 F.3d 428 (7th Cir. 2006), and reject it.

Palivos says that the government misled Black, causing him to plead guilty and testify falsely. The alleged manipulation involves the notes in Black's file regarding the purchase price dispute. As we said, at an interview with

Black's lawyer, the government said that there was forensic evidence showing that the notes were written well after the closing. Palivos argues that the government said the evidence was ink analysis, which, in fact, did not exist. The government denies ever saying there was ink analysis; rather, the evidence was the indentation analysis showing a 1997 date had been written on the sheet of paper above the one on which the notes were written, making it unlikely that the notes were written in 1996—at the time the deal was going down.

There are problems with Palivos's argument. Black's attorney at the time talked with the government, but Black himself was not involved in the conversation. There is no evidence that the government misled Black's attorney into thinking there was ink analysis, rather than simply indentation analysis. Furthermore, even if the government engaged in artifice, Palivos would still not have a claim: "Artifice and stratagem may be employed to catch those engaged in criminal enterprises." United States v. Swiatek, 819 F.2d 721, 725 (7th Cir. 1987), quoting Sorrells v. United States, 287 U.S. 435, 441 (1932).

More importantly, a new trial is ordered, on the basis of the use of perjured testimony, only if a defendant establishes that (1) there was perjured testimony, (2) of which the government knew or should have known, and (3) that testimony could have affected the outcome of the trial. United States v. Burke, 425 F.3d 400 (7th Cir. 2005). Palivos has not shown that Black's testimony is, in fact, false. Black has always maintained that he testified truthfully at trial. The jury was entitled to believe him.

There was other evidence as well. There was testimony from Dean Kalamantianos, who practiced law with Black and attended the real estate closing. Kalamantianos testified that Black told him about the bogus notes that he prepared at the request of Palivos. And although there was

no ink analysis, there was forensic evidence in the form of indentation evidence. Palivos has not shown that the district court abused its discretion by denying his request for a new trial based on this claim.

Next, we consider Palivos's argument that he should have a new trial, apparently because 5 days after trial he found "newly discovered evidence," which he says also reveals a government violation of Brady v. Maryland, 373 U.S. 83 (1963), and his confrontation and due process rights. We say "apparently" because the argument, presented in an almost stream-of-consciousness manner, is rather difficult to pin down.

To obtain a new trial under Federal Rule of Criminal Procedure 33, Palivos must show that the new evidence (1) was discovered after trial; (2) could not have been discovered sooner with due diligence; (3) was material in the sense that it bore directly on guilt or innocence and was simply impeaching or cumulative; and (4) if presented at a new trial would probably result in acquittal. United States v. Hodges, 315 F.3d 794, 801 (7th Cir. 2003). For a Brady violation to exist, entitling a defendant to a new trial, he must establish (1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defendant; and (3) that it is material to an issue at trial. Evidence is material if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985); see also United States v. Irorere, 228 F.3d 816 (7th Cir. 2000). Impeachment evidence falls within the Brady rule. Giglio v. United States, 405 U.S. 150 (1972). We review for abuse of discretion the denial of a motion for new trial based upon newly discovered evidence claimed to violate Brady. See United States v. Asher, 178 F.3d 486 (7th Cir. 1999); United States v. Silva, 71 F.3d 667 (7th Cir. 1995).

Palivos contends that an unsigned letter, dated February 13, 2003, apparently written by attorney Elliot Samuels to Black, is Brady material. It may be that he also contends two or three other letters, including a September 19, 2002, letter from Samuels to Aotirios Bregiannos in Athens, Greece, also are Brady material.

The February 13 letter states in part:

> Regarding these documents, it was represented by certain government agents that scientific, forensic tests had conclusively established that the documents were recently prepared and added to your file and, therefore, were not genuine. We now know that the government's motive for this deception (as it later proved to be) was to induce you to cooperate against certain individuals who had played various roles in the Waterfalls deal. . . . Fortunately for us, some of the indicted defendants entered not guilty pleas, which required the government to reveal and disclose the results of all scientific reports, otherwise these documents never would have seen the light of day. Contrary to the representations made, the forensic tests performed on the documents clearly do not substantiate and, in fact, contradict the assertions made by the government which induced you to cooperate.

The September 19 letter to Bregiannos states that "certain misrepresentations have been made to us by federal agents."

Palivos's theory is that the letters show that the government misrepresented the forensic evidence regarding the notes in Black's file. He claims Black would not have entered a guilty plea except for those misrepresentations. And Palivos contends that after finding out he had been duped, Black considered withdrawing his guilty plea based on prosecutorial misconduct. Ultimately, realizing he might face more serious consequences by withdrawing his

plea, Black changed his mind. The upshot of Palivos's argument is that the Samuels letters show Black was misled, and if he had not been misled, he would not have ended up testifying against Palivos.

That is a leap. And the argument lacks factual support. We are not told the basis for Samuels' belief that the government misrepresented the forensic evidence. In fact, Samuels stated in an affidavit that his letter was "bogus." Additionally, we find it curious that even if what Samuels' letter says is true, it does not show any real motive for Black to lie. Under Palivos's view of the facts, Black was the victim. Finally, there is no reasonable probability that a letter, termed bogus by the writer, which claims the government duped its own witness, would have changed the outcome of the proceedings. We also find that it was not an abuse of discretion for the district judge to decline to hold an evidentiary hearing on these remarkable claims.

Palivos also claims that he was denied a fair trial because the prosecutors misrepresented the evidence, violated the trial court's order, and made improper arguments to the jury. We review for an abuse of discretion the denial of a motion for a new trial based on prosecutorial misconduct. United States v. Andreas, 216 F.3d 645 (7th Cir. 2000). We must determine whether the prosecutor's remarks "so infected the trial that he was denied due process." United States v. Emenogha, 1 F.3d 473, 481 (7th Cir. 1993); see also United States v. Xiong, 262 F.3d 672 (7th Cir. 2001).

Once more, we return to Black's testimony. Palivos says that an assistant United States attorney, William Hogan, stated to the court that the defense was not in for any surprises at trial. But when Black took the stand, he told the jury a story about two pads of paper and two pens (with which he wrote the backdated notes for his file) when, prior to that time, he had said there was one pen

and a pad of paper. We are not overly impressed about the surprise value of testimony regarding two pads of paper, rather than one. A surprise would be if Black previously maintained that he did not write the notes and then suddenly testified that he did. Plus, the discrepancy is gift-wrapped cross-examination material.

Palivos also contends that AUSA Hogan failed to give the defense notice that the testimony of JACPG's accountant, Jerrold Weinstein, would be different at trial from that given before the grand jury. We do not quite follow the argument. Prior to Weinstein's trial testimony, Hogan advised the court that Weinstein would testify that Palivos was a shareholder in JACPG, whereas in front of the grand jury he said he had no knowledge whether Palivos was a shareholder in JACPG. That would seem to provide notice of the change in the testimony.

Palivos also argued that any testimony from Weinstein about Palivos's connection with JACPG would be hearsay because the basis of his knowledge was a conversation in which John or Chris Katris (two of the JACPG shareholders) told him that the "P" in JACPG stood for Peter. A lengthy conference was held outside the presence of the jury as to whether this testimony was inadmissible hearsay. The court ruled for the defense as to the "P" issue but went on to say:

> I believe that in order for this witness to give appropriate evidence, he works with the principal of the corporation. And so there as long as the question is focused with his work, the testimony—there is going to be some hearsay admissible.

The judge likened Weinstein's probable testimony with that of an expert witness, which prompted the defense to jump on another argument: that they had not received proper notice of expert testimony. The judge then arrived at the conclusion that Weinstein was a lay witness with

special expertise, and in order for him to apply his expertise in his job, he had to ask questions of the principals as to how corporation money should be distributed. With that, testimony recommenced.

During his testimony, Weinstein was not asked about the "P" in JACPG but at some point was asked how the money from the sale was distributed. He said, two shareholders each received $150,000 and two (George and Peter Palivos) each received $75,000. No simultaneous objection was lodged to the question which resulted in these answers, but after direct examination, defense counsel contended that it was hearsay and should be stricken. After some wrangling, the judge disagreed.

Palivos argues that all of this amounted to prosecutorial misconduct; that is, that in questioning Weinstein, AUSA Hogan simply disregarded the court's ruling. That argument cannot be sustained. The court's ruling as to what was excluded was very specific and was complied with. But there was some confusion as to what would be allowed and why. It cannot be said that the questions which were asked were in clear violation of the judge's ruling. And no simultaneous objection was made to the testimony. And even with all that said, it is rather hard to see why an accountant cannot testify about the people to whom funds were distributed and why.

Other claimed misconduct involves AUSA Hogan's reference to the defense case as weak and their arguments misleading. It is doubtful that any remarks called to our attention were improper, but certainly if they were, our review of the record shows that they did not infect the trial with unfairness.

Palivos's final claim is that the judge failed to instruct the jury on the elements of the offense of conspiracy to obstruct justice. This claim fails as well. When we review jury instructions for alleged errors of law, we reverse only

if the instructions, "viewed as a whole, misguide the jury to the litigant's prejudice." United States v. Souffront, 338 F.3d 809, 834 (7th Cir. 2003). We note that as long as " 'the instructions treat the issues fairly and accurately,' they will not be disturbed on appeal." Souffront, 338 F.3d at 834, quoting United States v. Thibodeaux, 758 F.2d 199, 202 (7th Cir. 1985). Furthermore, Palivos did not object to the instructions in the trial court, nor did he propose alternate instructions.

The instruction was as follows:

> A conspiracy is an agreement between two or more persons to accomplish an unlawful purpose. Peter Palivos is charged with conspiracy in Count 6.
>
> To sustain the charge of conspiracy, the government must prove the following: First, that the conspiracy as charged existed and, second, that each defendant knowingly became a member of the charged conspiracy with an intention to further the conspiracy. And, third, that an overt act was committed by at least one conspirator in furtherance of the charged conspiracy.
>
> If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty of the charged conspiracy. If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty of the charge of conspiracy.
>
> A conspiracy may be established even if its purpose was not accomplished. It is not necessary that all the overt acts charged in the indictment be proved and the overt act proved may itself be a lawful act. To be a member of the conspiracy, the defendant need not join

at the beginning or know all the other members or the means by which its purpose was to be accomplished. The government must prove beyond a reasonable doubt that the defendant was aware of the common purpose and was a willing participant.

To sustain the charge of obstruction of justice the government must prove the following propositions: First, that defendant Peter Palivos influenced, obstructed, impeded or endeavored to influence, obstruct or impede the due administration of justice. Second, that defendant Peter Palivos acted knowingly. And, third, that defendant Peter Palivos' acts were done corruptly; that is, by producing and causing the production of materially false and misleading documents in response to the grand jury subpoena served upon Nicholas Black with the purpose of wrongfully impeding the due administration of justice.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty. If, on the other hand, you find from your consideration of all of the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty. The word endeavor described any effort or act to influence, obstruct or impede the due administration of justice. The endeavor need not be successful but it must have at least a reasonable tendency to influence, obstruct or impede the due administration of justice.

While the relationship between the conspiracy and the obstruction of justice could have been stated a bit more clearly, we find that, viewed as a whole, the instructions fairly and accurately informed the jury of the elements of the crime.

We turn next to Mr. Marin. His basic contention is not that he is blameless, but rather that he was charged with the wrong crime. We agree.

Marin was charged with a violation of 26 U.S.C. § 7206(2). That section requires that a person willfully aid or assist in "the preparation or presentation under . . . the internal revenue laws, of a return . . . which is fraudulent . . . as to any material matter . . . ." There seems to be no dispute that to be a violation of this section the return must have been filed with the Internal Revenue Service. The fifth superseding Indictment in this case says that Marin aided in the preparation and presentation to the IRS an

> individual income tax return (Form 1040) on behalf of Peter Bouzanis for the calendar year 1994, which return defendant LOUIS MARIN did not believe was true and correct as to every material matter, in that at line 12 of the Form 1040, it falsely stated that Peter Bouzanis earned business income of $52,000, when in fact, as defendant LOUIS MARIN well knew, Peter Bouzanis did not earn such business income[.]

The problem is that the return for which there is some evidence of fraud is not the return which was filed with the IRS and cited in the indictment.

For the 1994 tax year, Bouzanis filed (on February 16, 1995) an individual income tax form 1040, showing wages, etc. of $11,005, as shown on a W-2 form, and adjusted gross income of $8,005. That paltry income, as we previously observed, would hardly inspire any lender to loan him $1.25 million. So Marin enters the picture. Marin said in his statement to Thomas Heinzer,a Special Agent with the SBA, Office of Inspector General, that he requested his friend, an accountant, to prepare a "bogus" tax return for Bouzanis and that the accountant insisted that the form be filed with the IRS. The form, Marin continued, was used

"to reflect a more favorable income history" for Bouzanis. The point of the whole enterprise, of course, was to obtain the loan.

So another 1040 was filed with the IRS. It showed business income (line 12) of $52,000. Attached to this form was a Schedule C—Profit or Loss From Business for sole proprietorships, reflecting the $52,000. This is the return cited in the indictment. But there is little, if any, evidence in the record that this return was fraudulent.

Also, it is not the return which was given to The Money Tree. That was yet another form—a Form 1040A individual tax return. It showed wages, salaries, etc. of $52,000. There is, of course, no W-2 attached to the 1040A because there was no such salary. The salary was, in Marin's word, "bogus." This is the return then lenders received, but it is undisputed that this return was not filed with the IRS.

Special Agent Heinzer testified that the only return he was "concerned about" was the one turned over to The Money Store—the 1040A. Marin's statement establishes that the 1040A was false and that it was used in an attempt to obtain a loan. But, to repeat, this return was not filed with the IRS.

As to the form which was filed—the 1040 with the Schedule C attached—the evidence falls short of showing beyond a reasonable doubt that it was false. Probably it was, but that is not good enough. In testimony before the grand jury which was read during the trial, Heinzer acknowledged that no one checked to see whether Bouzanis and Company had made $52,000. It is true that at trial he also testified that there is no Bouzanis and Company and that a subpoena was sent to the Illinois Secretary of State for records regarding that company or corporation and none were found. Crossexamination showed, however, that Heinzer did not know whether

Bouzanis was operating an unincorporated enterprise. Or, we might add, an illegal enterprise.

In short, we conclude that beyond a reasonable doubt the 1040A was patently false and it was used to defraud. The Money Store and the SBA. Also, beyond a reasonable doubt, that form was not filed with the IRS. The 1040 with the Schedule C was filed, but it cannot be said that it was false beyond a reasonable doubt. Marin aided in the commission of the fraud in this case, but he did not violate § 7206(2). Accordingly, his conviction must be vacated.

The judgment of conviction as to Peter Palivos is AFFIRMED; the judgment of conviction against Louis Marin is VACATED.

COUNT SIX

The SPECIAL FEBRUARY 2002-1 GRAND JURY further charges:

1. At times material to this indictment:

a. The Waterfalls Restaurant was a restaurant and bar located at 24436 West State Route 173 in Antioch, Illinois,

b. JACPG, Inc. (hereinafter "JACPG") was an Illinois corporation that owned the Waterfalls Restaurant until it sold the restaurant to Peter Bouzanis on or about April 24, 1996.

c. Nicholas Black was an attorney licensed to practice law in the State of Illinois. Black represented JACPG and its shareholders as their real estate attorney.

d. Defendant PETER PALIVOS was an attorney licensed to practice law in the State of Illinois. PETER PALIVOS was the brother of George Palivos, who was a shareholder of JACPG and an attorney licensed to practice law in the State of Illinois. PETER PALIVOS and George Palivos were engaged together in the practice of law.

e. The purchase of the Waterfalls Restaurant by Peter Bouzanis was financed in part by a $1,250,000 loan to Peter Bouzanis from The Money Store Investment Corporation (hereinafter"The Money Store"). A portion of this loan was guaranteed against default by the United States Small Business Administration ("SBA").

f. Subsequent to the purchase of the Waterfalls Restaurant by Peter Bouzanis, the SBA Office of Inspector General and the Federal Bureau of Investigation commenced a criminal investigation into the circumstances of the sale of the Waterfalls Restaurant. This investigation concerned, among other things, the following matters:

i. Whether Peter Bouzanis and persona associated with the seller of the restaurant, including defendant PETER PALIVOS, agreed to and did falsely represent to The Money Store that the purchase price for the restaurant was higher than it actually was, for the purpose of increasing the amount of money loaned for the purchase of the restaurant;

ii. Whether Peter Bouzanis and persona associated with the seller of the restaurant, including defendant PETER PALIVOS, agreed to and did create a $215,000 second mortgage from JACPG to Peter Bouzanis that JACPG never intended to enforce, in order to accommodate the inflated price;

iii. Whether Peter Bouzanis made false representations to The Money Store regarding his source of funds for a $325,000 down payment for the purchase of the restaurant and the existence of $45,000 in working capital, both of which were required by The Money Store as conditions of its loan to Peter Bouzanis;

iv. Whether persons associated with the seller of the restaurant, including defendant PETER PALIVOS, provided funds to Peter Bouzanis to assist him in deceiving The Money Store regarding the source of funds for the down payment and the existence

of the working capital;

v. Whether Peter Bouzanis and others, including defendant PETER PALIVOS, agreed to and did create a fictitious dispute between Peter Bouzanis and JACPG regarding the purchase price for the restaurant in order to justify the funds provided to Bouzanis; and

vi. Whether funds paid after the closing on the restaurant transaction by Peter Bouzanis to defendant PETER PALIVOS, including a $25,000 check signed by Peter Bouzanis and deposited into an account of defendant

PETER PALIVOS, represented partial repayment by Peter Bouzanis of funds advanced to him for the purpose of deceiving The Money Store into believing that Peter Bouzanis had satisfied its requirements regarding the down payment and working capital.

g. In connection with this investigation, in October 2000, defendant PETER PALIVOS and Nicholas Black were served with separate grand jury subpoenas that directed each of them to produce documents relating to the Waterfalls Restaurant before the SPECIAL JULY 2000-2 GRAND JURY.

2. Beginning in or around late October 2000, and continuing until at least on or about November IS, 2000, in the Northern District of Illinois, Eastern Division, and elsewhere,

PETER PALIVOS,

defendant herein, did conspire with Nicholas Black, and others known and unknown to the Grand Jury, to commit an offense against the United States, namely, to corruptly influence, obstruct and impede, and endeavor to influence, obstruct and impede, the due administration of justice, in violation of Title 18, United States Code, Section 1503.

3. It was part of the conspiracy of defendant PETER PALIVOS and Nicholas Black to meet and to discuss the grand jury subpoena served upon Black that directed Black to produce documents relating to the sale of the Waterfalls Restaurant to Peter Bouzanis. Among other things, defendant PETER PALIVOS and Nicholas Black discussed the documents that Black could produce in response to the grand jury subpoena served upon Black. PETER PALIVOS and Nicholas Black discussed that Black did not have any documents relating to the fictitious purchase price dispute or the $25,000 check signed

by Peter Bouzanis and deposited by defendant PETER PALIVOS.

4. It was further part of the conspiracy that defendant PETER PALIVOS and Nicholas Black agreed that Black would generate notes authored by Black (hereinafter "the notes") that would purport to relate to the fictitious purchase price dispute, even though such a dispute never existed, and to the $25,000 check signed by Peter Bouzanis and deposited by defendant PETER PALIVOS.

5. It was further part of the conspiracy that defendant PETER PALIVOS and Nicholas Black agreed that Black would endeavor to make the notes appear as if they were written around the time of the closing for the Waterfalls Restaurant in 1996.

6. It was further part of the conspiracy that defendant PETER PALIVOS and Nicholas Black agreed that, in response to the grand jury subpoena served upon Black, Black would produce the notes to government agents for transmission to the grand jury.

7. It was further part of the conspiracy that defendants would and did misrepresent, conceal and hide, and cause to be misrepresented, concealed and hidden, the acts and the purposes of the acts done in furtherance of the conspiracy.

OVERT ACTS

8. In furtherance of the conspiracy and to effect the unlawful objects of the conspiracy, defendant PETER PALIVOS and Nicholas Black committed and caused to be committed the following overt acts, among others, in the Northern District of Illinois, Eastern Division, and elsewhere:

a. In or around late October or early November

2000,defendant PETER PALIVOS and Nicholas Black met and agreed that Black would create false notes purportedly relating to the fictitious purchase price dispute and the $25,000 check from Peter Bouzanis to PETER PALIVOS,

b. On or about November 14, 2000, Nicholas Black generated the notes. One of the notes purported to describe the purchase price dispute between Peter Bouzanis and the sellers of the Waterfalls Restaurant, when in reality such a dispute never existed. The other note purported to describe the purpose for the$25,000 check signed by Peter Bouzanis and deposited by defendant PETER PALIVOS. Black dated each of the notes to make it appear as if the notes were written around the time of the sale of the Waterfalls Restaurant to Peter Bouzanis in 1996.

c. On or about November 15, 2000, Nicholas Black personally delivered documents to a government agent in response to the grand jury subpoena served upon Black. Included among these documents were the notes.

d. On or about November 15, 2000, at the request of defendant PETER PALIVOS, Nicholas Black met with defendant PETER PALIVOS to give him a copy of the documents, including the notes, that Black had produced earlier that day in response to the grand jury subpoena.

e. On or about November 16, 2000, in response to questions from government agents about the notes, Nicholas Black falsely confirmed that the notes were written around the time of the closing in 1996, when in reality, as Nicholas Black then and
there well knew, he had written them just a few days earlier.

In violation of Title 18, United States Code, Sections 371 and 2.

COUNT SEVEN

The SPECIAL FEBRUARY 2002-1 GRAND JURY further charges:

1. The allegations of paragraph 1 of Count six of this indictment are realleged and incorporated as though fully set forth here.

2. In or around November 2000, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere,

PETER PALIVOS,

defendant herein, did corruptly influence, obstruct and impede, and endeavor to influence, obstruct and impede, the due administration of justice, namely, by producing and causing the production of materially false and misleading documents in response to the grand jury subpoena served upon Nicholas Black;

In violation of Title 18, United States Code, Sections 1503 and 2.